

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**STATE OF OKLAHOMA, ex rel. W.A.  
DREW EDMONDSON, in his capacity as  
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STATE OF OKLAHOMA AND  
OKLAHOMA SECRETARY OF THE  
ENVIRONMENT C. MILES TOLBERT,  
in his capacity as the TRUSTEE FOR  
NATURAL RESOURCES FOR THE  
STATE OF OKLAHOMA**

**PLAINTIFFS**

**v.**

**CASE NO.: 05-CV-00329 GKF –SAJ**

**TYSON FOODS, INC., TYSON  
POULTRY, INC., TYSON CHICKEN,  
INC., COBB-VANTRESS, INC.,  
AVIAGEN, INC., CAL-MAINE FOODS,  
INC., CAL-MAINE FARMS, INC.  
CARGILL, INC., CARGILL TURKEY  
PRODUCTION, LLC, GEORGE'S,  
INC., GEORGE'S FARMS, INC.,  
PETERSON FARMS, INC., SIMMONS  
FOODS, INC. and WILLOW BROOK  
FOODS, INC.**

**DEFENDANTS**

**TYSON FOODS, INC.'S REPLY TO STATE OF OKLAHOMA'S RESPONSE IN  
OPPOSITION TO TYSON FOODS, INC.'S MOTION FOR RULE 37(a)(4)(A)  
EXPENSES AND ATTORNEYS' FEES**

Defendant Tyson Foods, Inc. ("Tyson") submits this reply to State of Oklahoma's response in opposition to Tyson Foods, Inc.'s Motion for Rule 37(a)(4)(A) Expenses and Attorney's Fees.

## INTRODUCTION

Plaintiffs, the State of Oklahoma, et al. have repeatedly refused to comply with their discovery obligations under the Federal Rules and the Orders of this Court.<sup>1</sup> Tyson's Second Motion to Compel represented the third occasion overall in which Plaintiffs have forced the Defendants to seek a court order to address Plaintiffs' refusal to comply with their discovery obligations. On two of those occasions, Defendants were forced to file Motions to Compel to settle the same act of noncompliance regarding the specific identification of documents responsive to Rule 34 requests for production. *See* Cargill Motion to Compel (Dkt. No. 902); Tyson Second Motion to Compel (Dkt. No. 1258). In response to the Cargill Motion to Compel, where Defendants first raised the Rule 34 deficiencies, this Court ordered Plaintiffs to supplement their Rule 34(b) production and explained specifically how their responses should be formed to comply with the Federal Rules. *See* May 17, 2007 Order (Dkt. No. 1150).

Disregarding the Court's May 17, 2007 Order and the clear requirements of the Federal Rules, Plaintiffs continued to obstruct legitimate discovery. Plaintiffs' responses to Requests for Production served by Tyson on April 25, 2007, included improper blanket claims of privilege or work-product, unfounded burden objections, and generic references to Plaintiffs' one million page "agency document production" in clear defiance of the standard announced by the Court in its May 17, 2007 Order (Dkt. No. 1150). Despite repeated attempts by Tyson to resolve the deficiencies without court action, Plaintiffs refused to provide satisfactory responses, forcing Tyson to file its Second Motion to Compel. *See* Dkt. No. 1258. The Court, after hearing

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<sup>1</sup> Plaintiffs' willful discovery violations have resulted in numerous discovery disputes, *see, e.g.*, Cobb-Vantress First Motion to Compel (Dkt. No. 743); Tyson Defendants Motion to Compel (Dkt. No. 1019); Cargill Motion to Compel (Dkt. No. 902); Cal-Maine Motion to Compel (Dkt. No. 1054), and several Orders from this Court. *See, e.g.*, January 17, 2007 Order (Dkt. No. 1016) (ordering Plaintiffs to produce sampling data); February 26, 2007 Order (Dkt. No. 1063) (ordering Plaintiffs to respond to Tyson Defendants' interrogatories), and May 17, 2007 Order (Dkt. No. 1150) (ordering Plaintiffs to respond to Cargill Defendants' interrogatories and to specifically identify documents responsive to Rule 34 requests for production).

arguments, found no justification for Plaintiffs' noncompliance with the May 17, 2007 Order and granted Tyson's Motion. *See* October 24, 2007 (Order, Dkt. No. 1336). The October 24 Order specifically tracked the May 17, 2007 Order in regard to Rule 34(b) production.

Plaintiffs' evasive and incomplete disclosure in response to Tyson's April 2007 document requests led to Tyson's Second Motion to Compel and this Court's October 24 Order. As discussed below, under the facts and circumstances of this case, Plaintiffs' responses to Tyson's requests for production were not substantially justified, nor would the imposition of sanctions be unjust in light of Plaintiffs' clear violations of both the Federal Rules and the orders of this Court. Accordingly, this Court should require Plaintiffs to reimburse Tyson for its reasonable attorneys fees and expenses under Rule 37(a)(4)(A).

## ARGUMENT

### I. PLAINTIFFS REPEATED VIOLATION OF COURT ORDERS AND THE FEDERAL RULES JUSTIFIES THE IMPOSITION OF ATTORNEYS' FEES AND EXPENSES UNDER RULE 37(a)(4)(A).

#### A. Fed. R. Civ. P. 37(a).

Under Rule 37(a) "a party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery." FED. R. CIV. P. 37(a). Contrary to the Plaintiffs' argument, a failure to disclose under the Rule includes not only a failure to produce documents but also any "evasive or incomplete disclosure." FED. R. CIV. P. 37(a)(3). Rule 37(a)(4)(A) provides that:

If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first

making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

Under this Rule, after granting a Motion to Compel the court *shall* award sanctions unless; (1) “the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action”; or (2) “that the opposing party's nondisclosure, response, or objection was substantially justified”; or (3) “that other circumstances make an award of expenses unjust.” These three preclusions to awarding sanctions are absent in this case.

B. Sanctions are Appropriate

1. Tyson contacted Plaintiffs in good faith to resolve the discovery issues prior to filing its Second Motion to Compel.

Plaintiffs’ responses to Requests for Production served by Tyson on April 25, 2007, included improper blanket claims of privilege or work-product, unfounded burden objections, and generic references to Plaintiffs’ one million page “agency document production” in clear defiance of the standard announced by the Court in its May 17, 2007 Order (Dkt. No. 1150). Tyson reminded Plaintiffs of their obligations under the Federal Rules and this Court’s May 17, 2007, Order in writing and in a telephonic meet and confer session prior to filing its Second Motion to Compel. *See* Dkt. No. 1258, Second Motion to Compel, p. 6 and Ex. 2. Tyson made a good faith effort to resolve this discovery issue prior to filing its Second Motion to Compel. Nonetheless, Plaintiffs refused to correct their clearly deficient responses.

2. Plaintiffs’ evasive and incomplete disclosures, in violation of the May 17, 2007 Order and the Federal Rules were not substantially justified.

Plaintiffs' objections to Tyson's Discovery Requests served on April 25 were not "substantially justified" under Rule 37(a)(4)(A). Plaintiffs correctly state the test to determine if the Plaintiffs' objections were substantially justified: "A party's 'nondisclosure, response, or objection was substantially justified' when there is a 'genuine dispute,' *see* Advisory Committee's Notes on 1970 Amendments to FED. R. CIV. P. 37(a)(4), or 'reasonable people could genuinely differ on whether a party was bound to comply with a discovery rule,' 8A V. Wright, A. Miller, & R. Marcus, Federal Practice & Procedure 2288." Plaintiffs, however, misapply the Rule in this case and attempt to brush over and ignore the explicit orders of this Court regarding discovery.

In Plaintiffs' Responses to Tyson's Requests for Production, Plaintiffs merely reference hundreds of boxes of documents "previously produced" by Plaintiffs. *See* Dkt. No. 1258, Second Motion to Compel, Ex. 1, Pltfs. Response to RFP Nos. 2, 5, 8, 9, 10, 11, 12, 13, 14, 19, 28 and 29. For example, in response to Tyson's requests for specific agreements or orders referenced by Plaintiffs in their responses to Requests for Admission, Plaintiffs directed Tyson to search 212 boxes of documents produced at OWRB and ODEQ. *See* Dkt. No. 1258, Second Motion to Compel, p. 10 and Ex. 1. Similarly, in response to Tyson's request for documents that comprise the evidence Plaintiffs claimed to possess regarding the amount of poultry litter applied in the IRW by contract growers for each defendant, Plaintiffs instructed Tyson to search for that information within the 18,000 pages of "grower and applicator records" previously produced from ODAFF and 12 boxes of documents, one hard drive and 25 CDs of materials included in their "Court Ordered Scientific Productions." *See* Dkt. No. 1258, Second Motion to Compel, Ex. 1. Plaintiffs refused to produce or to identify responsive documents and instead insisted Tyson search a mountain of documents.

Under Rule 34, Plaintiffs had two options in responding to Tyson's April 25 Requests for Production. They could have produced for inspection responsive documents as they were kept in the ordinary course of business. Offering inspection of warehoused documents does not satisfy Rule 34. *Am. Int'l Specialty Lines Ins. Co. v. NW1-1, Inc.*, 240 F.R.D. 401, 410-11 (N.D. Ill. 2007). In the alternative, Plaintiffs were required to "organize and label [the documents] to correspond with the categories in [each] request." FED. R. CIV. P. 34(b)(i). Plaintiffs did neither.

Plaintiffs' "agency document" production and their obligation to identify the location of documents responsive to each Rule 34 request was the subject of the Court's May 17, 2007 Order. *See* Cargill Defs. Motion to Compel (Dkt. No. 1054); May 17, 2007, Order (Dkt. No. 1150). This Court had previously held that the "agency document productions" to which Plaintiffs referred Tyson in response to these discovery requests did not satisfy the requirements of Rule 34. *See* May 17, 2007, Order (Dkt. No. 1150). The Court found "the documents in this case have been removed from their normal files and placed in boxes for review." *Id.* at 7. The Court further observed "the improbability that parties in the ordinary course of business 'routinely haphazardly store documents in a cardboard box.'" *Id.* at 7 (*quoting T.N. Taube Corp. v. Marine Midland Mortgage Co.*, 136 F.R.D. 449, 456 (W.D.N.C. 1991)). As a consequence, the Court ordered Plaintiffs to supplement their agency productions to "insure that a complete and fully accurate index shall be provided showing the box number which responds to each specific [Rule 34 request]." May 17, 2007, Order, p. 7 (Dkt. No. 1150).

Plaintiffs' responses to Tyson's Requests for Production were a flagrant and willful violation of this Court's May 17, 2007, Order (Dkt. No. 1150). Plaintiffs refused to provide Tyson with documents organized and labeled to correspond to the information sought in Tyson's Requests for Production. Further, documents responsive to these requests were not identified on

any of the document production indices provided by Plaintiffs. Plaintiffs' blanket references to hundreds of boxes of documents haphazardly produced fell far short of their obligations under Rule 34 and violated this Court's May 17, 2007 Order. Plaintiffs' response offers no explanation as to how their response to the Tyson Requests for Production were substantially justified in light of the Court's May 17, 2007 Order.

In fact, Plaintiffs made no mention of this Court's May 17 Order in their response. Instead, Plaintiffs declare that their inadequate responses were "substantially justified" because "'reasonable people could genuinely differ' on whether the State had a duty to do more under Rule 34." Pltfs. Res. Br. at p. 3. The May 17 Order required Plaintiffs to "insure that a complete and fully accurate index shall be provided showing the box number which responds to each specific Motion to Produce." (Dkt. No. 1150 at 7). The October 24 Motion directly referenced and incorporated the May 17 Order: After considering the motion the Court not surprisingly ordered Plaintiffs "to deliver supplemental production on or before October 22, 2007, which fully complies with the direction set forth in the Court's prior Order, Dkt. No. 1150. "Plaintiff is specifically directed to page seven (7) of the Order in regard to Rule 34(b) production." *See* October 24, 2007 Order (Dkt. No. 1336).

In reality, the Plaintiffs, having disregarded the clear language of Rule 34 with little consequence are attempting to disregard the specific language of the May 17, 2007 Court Order. The Order and the language of Rule 34 make it clear what was expected from Plaintiffs in answering Defendants' Request for Production. A reasonable person would recognize without necessity of a motion that Plaintiffs' Responses to Tyson's Requests for Production were inadequate and their objections were not "substantially justified."

3. An Award of Sanctions in this Case would not be unjust under Rule 37(a)(4)(A).

Plaintiffs assert that an award of sanctions would be unjust because “other Defendants – including Tyson – have, as a litigation protocol, engaged in the same conduct – specifically, the manner in which the attorney-client privilege and work-product doctrine were asserted – that formed the basis for Tyson’s motion.” Pltfs. Res. Br. at p. 7. Once again, Plaintiffs are refusing to acknowledge known facts in order to strengthen their argument. As quoted in Plaintiffs’ response to Defendants Motion for Sanctions, Tyson asserted the following objections in Tyson Foods, Inc.’s Responses to State of Oklahoma’s July 10, 2006 Set of Requests for Production:

General Objection No. 4:

Tyson objects to each and every discovery requests to the extent that it seeks a response, document, information, or item which is protected from discovery and privileged by reason of: (a) the attorney-client communication privilege; (b) the “work product” doctrine ...

General Objection No. 11:

The foregoing objections apply to each and every response herein. By specifically incorporating individual General Objections in any response, Tyson does not waive the application of the remainder of the general objections to such response.

Plaintiffs claim that these general objections mirrored those used in Plaintiffs’ productions and that it would be unjust to sanction Plaintiffs for using the same practices as the other parties to the suit. Further, Plaintiffs allege that “Tyson did not identify in its response (or separately) which documents it believed were responsive, but privileged, the standard to which Tyson sought to hold the State at the September 27, 2007 hearing.” Pltfs. Res. Br. at p. 7. These claims fail to acknowledge the further steps taken by Tyson to comply with the Federal Rules. Tyson produced a compact disk containing all documents responsive to the Plaintiffs’ July 10, 2006 Set of Requests for Production. Tyson also produced a privilege log with the disc which specifically identified each document and the basis for their privilege claim. For example:



Date	Author	Is Author an Attorney	Recipients	Document Type	Privilege Asserted	General Subject Matter
5/9/2004	T. Jones	Yes		Microsoft Word	Attorney/Client Privilege	Briefing sheet for meeting regarding Illinois River Watershed among Tyson Legal Team

This log complied with both the Federal Rules and the standards stated in the Court's October 24, 2007 Order. With this privilege log, Plaintiffs are able to identify which documents responsive to *their* requests have been withheld under a claim of privilege. In contrast, Plaintiffs referred Tyson to privilege logs prepared in connection with other defendants requests without any indication as to which of those documents, if any, were responsive to the Tyson requests. Contrary to the Plaintiffs' assertions, Tyson has not engaged in the same conduct as Plaintiffs. Accordingly, Plaintiffs argument that sanctions are unjust because of Tyson's similar practice is without merit. Moreover, Plaintiffs have not identified any abuse of Rule 34, which was the crux of Tyson's motion and the Court's order, by Tyson even remotely similar to Plaintiffs responses.

Plaintiffs repeated and unjustified violations of the Federal Rules warrant an award of Rule 37(a)(4)(A) expenses and attorneys' fees.

### CONCLUSION

For the foregoing reasons, Tyson Foods, Inc.'s Motion for 37(a)(4)(A) Expenses and Attorneys' Fees should be granted.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on the 26th day of November 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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